TCI Cablevision of Washington, Inc. *and* Todd Hood, Petitioner and Communications Workers of America, Local 7855, AFL–CIO. Case 19–RD–3297

September 30, 1999

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FOX, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered Objections to an election held January 22, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 86 for and 87 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that a Certification of Results of Election should be issued.

We affirm the hearing officer's recommendation to overrule the Union's Objection 3. Objection 3 alleged that the Employer impliedly made a promise to all its employees that they would receive a pay raise and a retirement plan if they voted the Union out.

No evidence was presented concerning a pay raise. The Employer, however, has maintained a 401(k) plan for many years, which plan was discussed at preelection meetings with employees. The unit employees here have been excluded from the plan by the plan's terms. Specifically, the plan states:

> Employee . . . exclud[es] any employee who is included in a unit of employees covered by a collective bargaining agreement between employee representatives and the company . . . which agreement does not provide for participation in the plan and provided further that retirement benefits were the subject of good faith bargaining between such employee representatives and the company.

The Employer and the Union had never agreed on coverage for the unit employees under this plan.

The hearing officer found that Employer Managers Hokonson, Bennett, and Humbert held three preelection meetings with unit employees. In these meetings, the 401(k) plan was addressed by the managers who spoke from prepared scripts. During the first or second meeting, employees were advised that the plan was available to most of TCI's employees and they were told that "*no union* has been able to get the plan on a contract from TCI."

Immediately following that remark, the employees were told that "TCI has always negotiated with unions to include employees in its own benefit plans. The only exceptions are new systems that TCI acquired that have unions, where TCI has not yet negotiated new union contracts."

During each meeting, employees were told that TCI could not promise what would happen to employees if the Union were voted out, although the Union was free to make promises. During the third meeting, employees were told that the Union had not been able to get the 401(k) plan. There was no further elaboration. The managers answered questions from employees at the meetings. When asked if the employees would receive the 401(k) plan if the Union were voted out, the managers stated that they would. The employees were further told at that time, "As I have said from the start, we are not making any promises about what you would get if the CWA is decertified. And if you think you've heard a promise, disregard it—no one has the authority to make a promise to you."

The hearing officer found that, according to the provisions of the Employer's 401(k) plan, as well as the provisions of ERISA, the plan must be available to all employees who are not represented by a collective-bargaining representative. The Employer is not free to select which nonrepresented employees will receive the benefit. Thus, the hearing officer found that the representations that the 401(k) plan would be available to unit employees, if the Union were decertified, were predictions and statements of fact. We agree with the hearing officer that Objection 3 is without merit.

An employer has the right to compare benefits presently in effect in its unorganized facilities with those enjoyed by employees in a similar facility which has union representation. *Walgreen Co.*, 203 NLRB 177, 181 (1973). In this regard, the instant case is analogous to *Viacom Cablevision*, 267 NLRB 1141 (1983). There, in a decertification context similar to that in this case, the employer compared the pay and benefits of employees in its nonunion locations with those received in its unionized locations. It stated that employees who decertified the union in one location had done better than those in another location who remained unionized. The employer also disclaimed any promise of what the employees might receive in the future. The Board found that providing this information about "historical fact" was not objectionable. Here, as in *Viacom*, the Employer informed the employees about a "historical fact," a benefit which its unrepresented employees received. And, also as in *Viacom*, the Employer advised the employees that it could not make any promises.

The 401(k) plan excludes represented employees only if the parties bargained in good faith concerning the plan,

[1] The Union has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

and if the contract did not contain the plan. The exclusion applied in this instance, for the contract covering the instant unit employees did not contain the 401(k) plan. The record does not show what transpired during previous negotiations between the parties, or the reason why the plan was not included in the contract. However, there is no allegation of bad-faith bargaining.

Contrary to the dissent, we find that the Employer's statements about the 401(k) plan did not include an objectionable promise of benefit. The Employer emphasized that it could make no promises. Critically, the Employer did not tell employees that the only way to receive the 401(k) was to oust the Union. The dissent argues that the Employer "made clear" to employees that decertifying the Union was a "necessary condition" for receiving the benefit. The Employer did no such thing. Rather, the Employer accurately reported that its nonrepresented employees received the benefit and that, in the past, the Union had not successfully negotiated for this benefit. The Employer never said that it would never agree with the Union to have such a plan.

The dissent relies in part on the fact that the Employer raised the 401(k) plan "on its own initiative." However, where, as here, an employer is truthful and makes no promises or threats, it is immaterial that the Employer was the one who raised the issue. See *Duo-Fast Corp.*, 278 NLRB 52 (1986).

The dissent also notes that the Employer stated that the plan was a significant financial benefit. Indeed, it was such a benefit, but that does not prevent the Employer from speaking truthfully about it.

The cases cited by our dissenting colleague are inapposite to the facts in this case. In *Grede Plastics*, 219 NLRB 592 (1975), the employer, 3 days before the election, sent a letter to its employees in which it described its nonunion plants as a "team," pointed out specific benefits enjoyed by this "team," which the employees represented by the union did not have, and implored the employees to decertify the union, join the "team," and enjoy the increased benefits. The clear implication was that the increased benefits would necessarily flow from joining the "team" and decertifying. In *Ranco Inc.*, 241 NLRB 685 (1979), the employer constantly emphasized in communications to the employees that employees at its nonunion plants enjoyed better benefits, while its supervisors told employees that they would get the better benefits if they decertified the union. There were no such promises in the instant case but rather a disclaimer of promises. In *Hertz Corp.*, 316 NLRB 672 (1995), the employer clearly conveyed the message to its employees that they would lose their 401(K) plan immediately if they voted for the union. Here, there was no 401(k) for employees to lose. In *Georgia-Pacific Corp.*, 325 NLRB No. 165 (1998),[2] the employer, at a meeting to announce the award of some bonuses during the critical period, stated that the bonus system was developed for nonunion plants; the Board found this conveyed the impression that the bonus system would be lost if the employees voted for union representation. Again, as noted above, in this case, there was no 401(k) for employees to lose. In sum, the employers in all of these cases engaged in behavior that is in marked contrast to that of the Employer here. The Employer here did nothing but inform its employees of the existence of a retirement plan presently enjoyed by its nonunion employees. When asked if the employees here would get the plan if they were not represented by the Union, the Employer made it clear that it would make no promises. It did not tell them that they must decertify the Union to receive the benefit. The Employer only recited facts and, in our view, it is not objectionable to truthfully inform employees of the facts.

Accordingly, we adopt the hearing officer's recommendations and we will issue a certificate of results.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Communication Workers of America, Local 7855, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER FOX, dissenting.

Unlike my colleagues and the hearing officer, I find merit in the Union's Objection 3. I would therefore set aside the election and direct a second election.

The relevant facts are as follows. The Employer has for many years maintained a 401(k) stock purchase plan in which the Employer matches employee contributions up to 10 percent of salary. Since its inception, the Employer has provided the plan only to its nonunion employees. However, contrary to the hearing officer, this is not because the plan rules exclude employees who are "represented by a union." As the majority decision notes, the plan documents merely state that the plan covers all employees of the employer other than employees who are covered by a collective-bargaining agreement which does not provide for participation in the plan. Thus, although at the time of the election, the collective-bargaining agreement covering the unit employees did not provide for their participation in the plan, nothing in the plan would have precluded the Employer from entering into an agreement with the Union providing for their participation.

It is undisputed that the Employer, on its own initiative, raised the subject of its 401(k) plan at three captive audience meetings before the election. At the first of those meetings, representatives of the Employer advised

[2] Member Hurtgen dissented in *Georgia-Pacific*, and would not have found the employer's activity objectionable. However, he agrees that the instant case is distinguishable. Member Brame agrees that *Georgia-Pacific* is distinguishable without passing upon its validity.

the employees of the existence of the plan, which they described as being "like getting a 10% raise." The employees were told that TCI offered the plan to all of its nonunion employees, but that "*no union* has been able to get that plan in a contract from TCI." (The emphasis is from the prepared script from which the Employer's managers read.) At both of the two subsequent meetings, representatives of the employer again brought up the plan as a benefit that was offered to employees at its nonunion facilities. At the third meeting, they again emphasized to the employees that "[y]our Union was not able to get you the 401(k) Stock Purchase Plan, so you don't have that." Later in the same meeting, the employees were expressly told that if they voted the Union out, they would receive the plan. Finally, on the morning of the election, one of the employer's supervisors told employees how well the stock was doing.

My colleagues and the hearing officer find that this was not objectionable conduct because in promising that the employees would receive the 401(k) plan if they voted to decertify the Union, the Employer was merely "stating a fact." But this conclusion misperceives the nature of the Petitioner's objection and ignores what I regard as dispositive Board precedent regarding campaign tactics of the sort engaged in by the Employer here. In its Objection 3, the Petitioner complained that "[t]he company implied a promise to all the employees that they would receive . . . a retirement plan *only if they voted the union out*." (Emphasis added.) Thus, the gravamen of the Union's objection was not only that the Employer told employees that they would be covered by the 401(k) plan if the Union was decertified, but that it conveyed to the employees the message that it would not agree to allow them to be covered by the 401(k) plan *unless* they voted to decertify the Union. As the Petitioner correctly argues, such conduct has long been held by the Board to be both unlawful and grounds for setting aside an election.

Thus, in *Grede Plastics*, 219 NLRB 592, 593 (1975), the Board set aside an election because of a letter the Employer sent to employees prior to a decertification election in which it urged the employees to "consider the facts" that employees at its nonunion facilities received larger and more frequent wage increases, enjoyed a better fringe benefit package, and had greater job security than the unionized employees had under their union contract. The letter invited employees to become "part of this successful team" of nonunion employees by voting against the union. In finding the letter to be objectionable, the Board explained that [s]ince the employees knew that if the decertification were unsuccessful the Union would be bargaining with the Employer over wages, fringe benefits, and job security, the employees also knew that it was within the Employer's power to agree or not to agree to employment terms desired by them. Thus it is clear that the contents of the letter told employees that if they joined the Employer's "team" of nonunion employees, they as "team" members would enjoy "team" benefits. At the same time the letter had the effect of warning employees that if they declined to join the "team" by voting against decertification, the Employer would take a tough stand during negotiations and would not agree to terms and conditions of employment comparable to those enjoyed by the nonunion employees.

The statements of the Employer here were to the same effect. In the captive audience meetings, the Employer both explicitly promised the employees that if they voted to oust the union, they would receive the 401(k) plan benefit,[3] and warned them that if they voted to keep the Union, the Employer would oppose giving them the benefit as it had successfully opposed giving the benefit to any unionized employees in the past. Through this combination of promise and threat, the Employer thus made clear what the necessary condition was to be able to participate in the 401(k) plan: a vote to decertify the union.

The Employer defends its statements about "no union" being able to get the 401(k) benefit for represented employees on grounds that it was just describing the realities of collective bargaining. But the Employer's statements contained no reference to the give-and-take of the negotiating process. Moreover, the Employer cited no economic or other objective considerations to explain why it was willing to provide the benefit to its nonunion employees, but unwilling to give it to employees who were union represented. In the absence of any such explanation, the clear import of the Employer's message was that union status was the determinative factor.

The Board has repeatedly held that such statements constitute grounds for setting aside an election. Thus, in *Georgia-Pacific Corp.*, 325 NLRB 867 (1998), the Board found that the employer had engaged in objectionable conduct during preelection meetings when it described its bonus plan as one that was "developed for nonunion plants," thereby suggesting to employees that they would be foreclosed from continuing to participate in the plan if they chose union representation. Similarly, in *Hertz Corp.*, 316 NLRB 672, 693 (1995), the Board found objectionable an employer's distribution of a summary of its 401(k) plan which stated that the plan applied only to

[3] My colleagues attempt to minimize the significance of the explicit statement that the employees would receive the 401(k) plan if the Union was decertified by noting that at other times during the series of meetings, employer representatives stated that TCI could not promise what would happen to employees if the Union were voted out.

However, "[i]t is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." *Michigan Products*, 236 NLRB 1143, 1146 (1978). As the Board held in *Lutheran Retirement Village*, 315 NLRB 103, 104 (1994), an employer's rote disclaimers of the ability to make promises do not negate the objectionable effects of statements promising benefits if employees vote to decertify their union.

nonunion employees. See also *Ranco Inc.*, 241 NLRB 685 (1979) (finding objectionable conduct where employer, as part of election campaign, emphasized to employees that their benefits were less than those received by employees at its nonunion facility, and told the employees they would get the same benefits as the nonunion employees if they voted the union out.)

By emphasizing its disparate treatment of union and nonunion employees with respect to the application of its 401(k) plan, the Employer interfered with the employees' ability to freely choose whether or not they wished to continue to be represented by the Union. Accordingly, I dissent from the decision to certify the election results.